IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 354 of 2002.

Judgement reserved on: 18.6.2007

Date of decision: 20.6. 2007.

Dr. Ashok Sarial **…….Appellant**

Vs.

Kamlesh Thakur **…. Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No.

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.

For the Respondent : None.

Kuldip Singh, Judge.

This appeal is directed against the order/decree dated 15.6.2002 allowing maintenance to children namely Kumari Natash, master Aman, under Section 26 of the Hindu Marriage Act, 1955 (for short Act) from the date of petition i.e. 15.10.1999.

The brief facts are that Dr. Ashok Sarial and Kamlesh Thakur were married on 6.11.1988 and two children namely Kumari Natash and master Aman were born from the wedlock. The wife filed petition under Section 10 of the Act for judicial separation which was allowed by learned Addl. District Judge, Solan Camp at Nalagarh on 18.4.1997 . There was no resumption of co-habitation between the parties to the marriage after 18.4.1997. In those circumstances a Petition under Section 13 (1-A) (i) of the Act was filed on 15.10.1999

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

for dissolution of the marriage. In the divorce petition an application under Section 26 of the Act was filed on 11.6.2002 by children namely Kumari Natash and master Aman through their mother Smt. Kamlesh Thakur seeking maintenance from their father Dr. Ashok Sarial. In the application maintenance at Rs.7,000/- per month was prayed for daughter Kumari Natash and Rs.5,000/- per month for son master Aman. The appellant did not file reply to application under Section 26 of the Act. The learned Addl. District Judge on 15.6.2002 granted decree of divorce and has allowed Rs.6,000/- per month maintenance in favour of both the children till they attain majority under Section 26 of the Act. The order passed under Section 26 was made part of the decree passed in HM. Petition No.15-NL/30 of 1999 under Section 13(1-A) (i) of the Act. Dr. Ashok Sarial father of the children has assailed the order dated 15.6.2002 under section 26 of the Act which has been made part of decree in the divorce petition.

I have heard learned counsel for the appellant and have also gone through the record.

The learned counsel for the appellant has fairly stated that the appellant is aggrieved only against the impugned decree to the extent maintenance has been allowed to children namely Kumari Natash and master Aman from the date of presentation of divorce petition. He has not assailed the quantum of maintenance. According to him at the most the maintenance should have been granted to the children from the date of filing of the application under Section 26 of the Act which was filed on 11.6.2002. The learned counsel has submitted that under

Section 26 of the Act maintenance can not be allowed to the children from a date earlier to the filing of the application for maintenance. He has further submitted that the application under Section 26 of the Act was not supported by an affidavit nor Court below gave an opportunity to the parties to lead evidence on the application. The Court below even not directed the parties to file affidavits, so as to effectively decide the application under Section 26 of the Act. He, however, submitted that his client Dr. Ashok Sarial is aware of his responsibility to maintain the children. He has relied on ***Smt. Alka Bhaskar Bakre*** **vs**. **Bhaskar Satchidanand Bakre [*AIR 1991 Bombay 164],*** on the proposition that maintenance under Section 26 of the Act should be allowed from the date of filing of the application and not from the date of filing of the main divorce petition.

The allegations made in the application under Section 26 of the Act have not been proved by leading evidence or by way of affidavits. In these circumstances, it is not possible to come to the conclusion that Dr. Ashok Sarial had not rendered any financial help for maintaining the children and therefore, in my view Court below has erred in awarding maintenance to the children w.e.f. 15.10.1999, the date of filing of the divorce petition. The application under Section 26 of the Act was filed on 11.6.2002 and therefore, the children are entitled to maintenance under Section 26 of the Act from 11.6.2002, and not from 15.10.1999 when the divorce petition was filed. The order dated 15.6.2002 on the application under Section 26 of the Act and the impugned decree

to the extent allowing maintenance under Section 26 of the Act w.e.f. 15.10.1999 are modified. It is held that Kumari Natash and master Aman are collectively entitled to maintenance Rs.6,000/- per month from their father Dr. Ashok Sarial w.e.f. 11.6.2002 onwards till they attain majority . The appeal is disposed of on above terms. No order as to costs.

(Kuldip Singh)
Judge

June 20, 2007
(sks)